

1 WRIGHT, FINLAY & ZAK, LLP
2 Branden D. Kartchner, Esq.
3 Nevada Bar No. 14221
4 Christina V. Miller, Esq.
5 Nevada Bar No. 12448
6 7785 W. Sahara Ave., Ste. 200
7 Las Vegas, NV 89117
8 (702) 475-7964; Fax: (702) 946-1345
9 bkartchner@wrightlegal.net

10 *Attorney for Defendant, U.S. Bank National Association, as Trustee for MASTR Asset Backed*
11 *Securities Trust 2006-HE5 Mortgage Pass-Through Certificates, Series 2006-HE5(erroneously*
12 *name US Bank National Association), Western Progressive-Nevada, Inc., and PHH Mortgage*
13 *Corporation (incorrectly named as “PHH Mortgage Services”)*

14 **UNITED STATES DISTRICT COURT**

15 **DISTRICT OF NEVADA**

16 ALFRED CLARK,

17 Plaintiff,

18 v.

19 US BANK, NATIONAL ASSOCIATION;
20 WESTERN PROGRESSIVE – NEVADA,
21 INC.; PHH MORTGAGE SERVICES,

22 Defendants.

Case No. 2:23-cv-00493-GMN-BNW

MOTION TO DISMISS

23 Defendants U.S. Bank National Association, as Trustee for MASTR Asset Backed
24 Securities Trust 2006-HE5 Mortgage Pass-Through Certificates, Series 2006-HE5(erroneously
25 name US Bank National Association) (“U.S. Bank Trustee”), Western Progressive-Nevada, Inc.
26 (“Western Progressive”), and PHH Mortgage Corporation (incorrectly named as “PHH Mortgage
27 Services”) (“PHH”) (collectively “Defendants”) respectfully submits its Motion to Dismiss
28 Plaintiff Alfred Clark’s (“Clark”) Complaint.

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1 This Motion is based on the following Memorandum of Points and Authorities, all papers
2 and pleadings on file herein, and on any oral or documentary evidence that may be presented at a
3 hearing on this matter.

4 DATED this 8th day of May, 2023.

5 WRIGHT, FINLAY & ZAK, LLP

6
7 /s/ Christina V. Miller

8 Christina V. Miller, Esq.

9 Nevada Bar No. 12448

Branden D. Kartchner, Esq.

Nevada Bar No. 14221

7785 W. Sahara Ave., Suite 200

Las Vegas, Nevada 89117

Attorneys for Defendant, U.S. Bank National
Association, as Trustee for MASTR Asset
Backed Securities Trust 2006-HE5 Mortgage
Pass-Through Certificates, Series 2006-
HE5(erroneously name US Bank National
Association), Western Progressive-Nevada,
Inc., and PHH Mortgage Corporation

17 I. INTRODUCTION

18 This action involves Alfred Clark's ("Clark") fourth lawsuit against various entities arising
19 out of the same common nucleus of facts. In this iteration, Clark is attempting to bring claims that
20 have already been dismissed and rejected multiple times on several grounds, including claim
21 preclusion. In the last go-around, the Ninth Circuit Court of Appeals affirmed a prior dismissal for
22 the last version of his Complaint. Yet, Clark filed this lawsuit anyway, forcing Defendants to
23 defend a lawsuit they have already won multiple times and unnecessarily burdening judicial
24 resources. Just like multiple courts have done previously, this Court should dismiss this Complaint
25 with prejudice.

26 Clark's repeat lawsuits stem from the initiation of foreclosure under a deed of trust against
27 the real property located at 5613 Harmony Avenue, Las Vegas, Nevada 890107; APN: 138-36-
28 110-054 (the "Property") after Clark defaulted on his mortgage payments. Across the many *pro se*

lawsuits, Clark’s main contention has been that the 2009 Assignment of the Deed of Trust to U.S. Bank from Appellee New Century Mortgage Company (“New Century”), through Appellee Barclays Capital Real Estate Inc. (“Barclays”) via a Limited Power of Attorney, was invalid due to New Century’s bankruptcy proceeding filed in 2007.¹ In this version of the Complaint, Clark does not seem to move to enjoin the pending foreclosure proceedings. Instead, he complains that he has been “harassed and abused” because of the lending entities repeated attempts at foreclosure over the years.²

A brief recitation of the procedural history reveals Clark pursues claims that are dead and buried: On September 7, 2016, Appellant filed his first complaint, which was voluntarily dismissed on April 18, 2017, because the district court refused to grant Clark *in pro forma* status.³

Clark filed his second lawsuit on April 17, 2017, against virtually the same parties in the present action, alleging claims for Wrongful Foreclosure, Violations of the FDCPA, and Violations of Public Law §§ 95-109, 807, 808, 812, and 813 (“2017 Action”).⁴ After these entities moved to dismiss the Complaint, the district court dismissed Clark’s Wrongful Foreclosure claim without prejudice as unripe given that a foreclosure sale under the Deed of Trust had not occurred and dismissed the FDCPA claims with prejudice based upon the expiration of the statute of limitations (“2017 Dismissal Order”).⁵

Undeterred, Clark initiated a third lawsuit on November 21, 2018, asserting the same allegations as in the 2017 Action: that the various lending entities lacked authority to foreclose, their actions violated the FDCPA, and they engaged in a conspiracy to fraudulently deprive Clark of the Property. After the defendants moved to dismiss, the district court dismissed the action, finding that Clark was precluded from relitigating the same claims arising out of the same facts

¹ See, e.g., Complaint at 2:15-3:4; 5:1-18; 6:8-24.

² *Id.* at 5:10-18.

³ See *Alfred Clark v. New Century Mortgage Company, et al.*, Case No. 2:16-cv-021103-GMN-GWF.

⁴ See *Alfred Clark v. New Century Mortgage Company, et al.*, Case No. 2:17-cv-01065-JAD-VCF.

⁵ See March 16, 2018 Dismissal Order, attached as **Exhibit 1**; See *Alfred Clark v. New Century Mortg. Co.*, 2018 WL 1367357 (D. Nev. March 16, 2018).

alleged in the 2017 Action.⁶ Clark appealed to the Ninth Circuit Court of Appeals, which ultimately affirmed the dismissal, noting that Clark was barred from alleging violation of the FDCPA on claim preclusion grounds.⁷

Despite this, on April 4, 2023, Clark filed this action, which should likewise be dismissed because Clark's several ostensible FDCPA claims are untimely, barred by the doctrine of claim preclusion, and fail to state a claim upon which relief may be granted. Furthermore, while Clark cites to 12 U.S.C. § 2605 as a claim for relief in the Complaint's caption, which he has done before, he does not specify, much less explain, which subsection(s) Defendant(s) allegedly violated. Nor does he provide any factual basis to support such a claim, rendering it ripe for dismissal. Additionally, Clark's claim for "abuse and harassment" is a nonexistent civil cause of action in Nevada, mandating dismissal. Accordingly, Clark's entire Complaint should be dismissed, with prejudice, as a matter of law.

II. FACTUAL BACKGROUND

A. The Mortgage Loan.

On June 21, 2006, Alfred Clark purchased the Property known as 5613 Harmony Ave., Las Vegas, NV 89107 (the "Property"). To purchase the Property, Clark obtained a loan in the amount of \$204,000.00 ("Note"). The Note was secured by a first position deed of trust which was recorded on June 27, 2006, in the Clark County Recorder's Office, naming Clarion Mortgage Capital, Inc. as the beneficiary ("Deed of Trust").⁸ Clarion Mortgage Capital, Inc. assigned the Deed to New Century on January 26, 2007.⁹ On or about December 1, 2006, New Century sold the Note to U.S. Bank, National Association as Trustee under Pooling and Servicing Agreement Dated as of

⁶ See September 10, 2019 Dismissal Order, attached as **Exhibit 2**; *Clark v. New Century Mortg. Co.*, No. 2:18-cv-02241-APG-BNW, 2019 U.S. Dist. LEXIS 153787 (D. Nev. Sep. 10, 2019).

⁷ See January 26, 2021 Ninth Circuit Order of Affirmation, attached as **Exhibit 3**; *Clark v. New Century Mortg. Co.*, 834 F. App'x 380 (9th Cir. 2021).

⁸ A true and correct copy of the Deed of Trust, recorded as Book and Instrument Number 20060627-004374 in the Clark County Recorder's Office, is attached to the Defendants' Request for Judicial Notice ("RJN") as Exhibit 4. All other recordings hereafter are recorded in the same manner and method.

⁹ A true and correct copy of the Corporation Assignment of Deed of Trust, recorded as Book and Instrument Number 20070208-0002823, is attached to the Defendants' RJN as Exhibit 5.

December 1, 2006 MASTR Asset Backed Securities Trust 2006-HE5 Mortgage Pass-Through Certificates Series 2006-HE5.¹⁰ The formal assignment of the beneficiary interest was executed on or about January 9, 2009 and recorded against title to the Property.¹¹

B. The New Century Bankruptcy.

Before the formal assignment was recorded, New Century filed for bankruptcy.¹² However, New Century executed a Limited Power of Attorney granting Barclays Capital Real Estate, Inc. dba HomEq Servicing the power to execute assignments. On January 30, 2008, Barclays filed a Motion for Relief from Stay to Allow Use of the Limited Power of Attorney.¹³ That Motion was granted on February 19, 2008, allowing Barclays to execute and record the assignment to U.S. Bank.¹⁴ On January 9, 2009, Barclays, on behalf of New Century, executed the aforementioned Corporation Assignment of Deed of Trust to U.S. Bank Trustee, which was recorded on March 13, 2009 (hereinafter, "Assignment").¹⁵ U.S. Bank Trustee remains the current beneficiary under the Deed of Trust.

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¹⁰ A true and correct copy of the Pooling and Servicing Agreement and an excerpt of the Mortgage Loan Schedule thereto are attached to the Defendants' RJN as Exhibit 6.

¹¹ A true and correct copy of the Corporation Assignment of Deed of Trust, recorded as Book and Instrument Number 20090313-0004015, is attached to the Defendants' RJN as Exhibit 7.

¹² A true and correct copy of New Century TRS Holdings, Inc.'s Petition in *In re: New Century TRS Holdings, Inc., a Delaware corporation*, U.S. Bankruptcy Court, District of Delaware, Petition No. 07-10416-BLS, ECF No. 1, is attached to the Defendants' RJN as Exhibit 8.

¹³ A true and correct copy of Motion for Relief from Stay by HomEq Servicing to Allow Use of Limited Powers of Attorney in *In re: New Century TRS Holdings, Inc., a Delaware corporation*, U.S. Bankruptcy Court, District of Delaware, Petition No. 07-10416-BLS, ECF No. 4746, is attached to the Defendants' RJN as Exhibit 9.

¹⁴ A true and correct copy of Order Allowing Barclays Capital Real Estate, Inc. dba HomEq Servicing to Use Limited Powers of Attorney in *In re: New Century TRS Holdings, Inc., a Delaware corporation*, U.S. Bankruptcy Court, District of Delaware, Petition No. 07-10416-BLS, ECF No. 4936, is attached to the Defendants' RJN as Exhibit 10.

¹⁵ See Exhibit 7 of Defendants' RJN.

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2 **C. Clark's Default on the Loan and Lawsuits.**

3 On or about March 21, 2016, Clark received a Notice of Default and Election to Sell Real
4 Property Under Deed of Trust ("NOD").¹⁶ The NOD stated that Clark was due for payment on the
5 Note since June 1, 2014.

6 On September 7, 2016, Clark filed a Complaint for Wrongful Foreclosure. ("2016
7 Lawsuit").¹⁷ In summary, Clark claimed that the named Defendants violated the Fair Debt
8 Collection Practices Act ("FDCPA") because, according to him, the Assignment to U.S. Bank was
9 not valid; therefore, the Defendants were not entitled to foreclose upon the Property. This
10 Complaint, however, Defendant voluntarily dismissed his wrongful foreclosure suit and seemingly
11 dropped those claims against Defendant.¹⁸

12 Clark filed his second lawsuit on April 17, 2017, against U.S. Bank, Western Progressive
13 and Ocwen Loan Servicing ("Ocwen"). PHH, a current defendant, is the successor by merger to
14 Ocwen. Clark brought claims for Wrongful Foreclosure, 12 U.S.C. § 2605, Violations of the
15 FDCPA, and Violations of Public Law §§ 95-109, 807, 808, 812, and 813 ("2017 Action").¹⁹ The
16 defendants moved to dismiss the Complaint, and on March 16, 2018, the Honorable Judge Dorsey
17 dismissed Clark's Wrongful Foreclosure claim, without prejudice, as unripe given that a
18 foreclosure sale under the Deed of Trust had not occurred and dismissed the FDCPA claims, with
19 prejudice, based upon the expiration of the statute of limitations.²⁰

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21
22
23 ¹⁶ A true and correct copy of Notice of Default and Election to Sell Real Property Under Deed of
Trust, recorded as Book and instrument Number 20160321-0002322, is attached to Defendants'
24 RJN as Exhibit 11.

25 ¹⁷ See *Alfred Clark v. New Century Mortgage Company et al.*, U.S. District Court, District of
Nevada, Case No. 2:16-cv-02113-GMN-GWF ("2016 Lawsuit"), ECF 1-1.

26 ¹⁸ See *Alfred Clark v. New Century Mortgage Company, et al.*, Case No. 2:16-cv-02113-GMN-
GWF.

27 ¹⁹ See *Alfred Clark v. New Century Mortgage Company, et al.*, Case No. 2:17-cv-01065-JAD-
VCF.

28 ²⁰ See **Exhibit 1**; See *Alfred Clark v. New Century Mortg. Co.*, 2018 WL 1367357 (D. Nev. March
16, 2018).

1 Undeterred, Clark filed a third lawsuit²¹ on November 21, 2018, asserting the same
 2 allegations as in the 2017 Action: that the various lending entities lacked authority to foreclose,
 3 their actions violated the FDCPA, and they engaged in a conspiracy to fraudulently deprive Clark
 4 of the Property. The lending entities moved to dismiss, and the district court dismissed the action,
 5 finding that Clark was precluded from relitigating the same claims arising out of the same facts
 6 alleged in the 2017 action.²²

7 Clark appealed to the Ninth Circuit Court of Appeals, which ultimately affirmed the
 8 dismissal, noting that Clark was barred from bringing the FDCPA on claim preclusion grounds.²³
 9 The Ninth Circuit declared “[t]he district court properly dismissed Clark’s FDCPA claim based on
 10 res judicata because Clark’s claim arises out of the same nucleus of operative fact as his FDCPA
 11 claims in his prior federal action against appellees that resulted in a final judgment on the merits.”²⁴
 12 The court also noted that Clark’s state law claims “may not have been barred by res judicata,
 13 dismissal of those claims was proper because Clark failed to allege facts sufficient to state any
 14 plausible claims.”²⁵

15 On April 4, 2023, Clark filed this Complaint, alleging violations of the FDCPA, including
 16 Violations of Sections §§ 807 1692(e), 808 1692(f), and 812 1692(j), and 12 USC § 2605; Clark
 17 also brought state law claims for “harassment and abuse.”²⁶ Nevertheless, all Clark’s claims fail
 18 as a matter of law and should be dismissed.

19 III. LEGAL STANDARD

20 A. Requirement of a Short and Plain Statement.

21 Pursuant to Fed. R. Civ. P. Rule 8(a)(2), a pleading that states a claim for relief must contain
 22 “a short and plain statement of the claim showing that the pleader is entitled to relief.” Clark’s
 23

24 ²¹ In this version, Clark named New Century Mortgage Company, US Bank, National Association,
 25 Barclays Capital Real Estate Inc., Western Progressive-Nevada, Inc., Ocwen Loan Servicing,
 LLC.

26 ²² See **Exhibit 2**; *Clark v. New Century Mortg. Co.*, No. 2:18-cv-02241-APG-BNW, 2019 U.S.
 Dist. LEXIS 153787 (D. Nev. Sep. 10, 2019).

27 ²³ See **Exhibit 3**; *Clark v. New Century Mortg. Co.*, 834 F. App’x 380 (9th Cir. 2021).

28 ²⁴ *Id.*

²⁵ *Id.*

²⁶ See Complaint at ECF 1.

1 Complaint and the incorporated exhibits are anything but short or plain. Many of the same
 2 allegations are repeated multiple times, but with no specification as to which actions are
 3 attributable to which Defendant(s), and thus no specification as to which Defendant(s) allegedly
 4 caused his alleged damages. Clark instead opts to make conclusory statements about the validity
 5 of recorded documents, and on these conclusions asserts claims against Defendants altogether.
 6 Thus, this Court would be warranted in dismissing the entire Complaint on basis of Clark's failure
 7 to adhere to the rules of proper pleading.

8 **B. Motion to Dismiss.**

9 Pursuant to Fed. R. Civ. P. Rule 12(b)(6), "failure to state a claim upon which relief can be
 10 granted" is a basis to dismiss a Complaint where the moving party can demonstrate beyond doubt
 11 that Plaintiff cannot provide a set of facts in support of his claim which would entitle him to relief,
 12 such that this Motion to Dismiss should be granted. *Puckett v. Park Place Entertainment Corp.*,
 13 332 F. Supp. 2d 1349, 1352 (D. Nev. 2004). In deciding, the allegations made in the Complaint
 14 are generally taken as true and viewed in the light most favorable to the non-moving party. *Id.*
 15 Although the Court should typically take the allegations as alleged in the Complaint as true,
 16 "Courts do not assume the truth of legal conclusions merely because they are cast in the form of
 17 factual allegations." *Puckett*, 332 F. Supp. 2d at 1352 (*quoting Western Mining Counsel v. Watt*,
 18 643 F.2d 618, 624 (9th Cir. 1981)). Specifically, "conclusory allegations of law and unwanted
 19 inferences are insufficient to defend a Motion to Dismiss for failure to state a claim." *In re Stac*
 20 *Electronics Securities Litigation*, 89 F.3d 1399, 1403 (9th Cir. 1996) (*quoting In re VeriFone*
 21 *Securities Litigation*, 11 F.3d 865, 868 (9th Cir. 1993)). Legal conclusions couched as factual
 22 allegations are not given a presumption of truthfulness, and "conclusory allegations of law and
 23 unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. F.D.I.C.*, 139
 24 F.3d 696, 699 (9th Cir. 1998).

25 Moreover, even though "[g]enerally, a district court may not consider any material beyond
 26 the pleadings in ruling on a Rule 12(b)(6) motion ... material which is properly submitted as part
 27 of the Complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard*
 28 *Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). Likewise, "documents

1 whose contents are alleged in a Complaint and whose authenticity no party questions, but which
 2 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion
 3 to dismiss” without converting the motion to dismiss into a motion for summary judgment. *Branch*
 4 *v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Furthermore, under Federal Rules of Evidence 201,
 5 a court may take judicial notice of “matters of public record.” *Mack v. South Bay Beer Distrib.,*
 6 798 F.2d 1279, 1282 (9th Cir. 1986). Accordingly, this Court may consider the recorded
 7 documents referred to in the Complaint and referred to herein without the Motion to Dismiss being
 8 converted into a motion for summary judgment.

9 IV. LEGAL ARGUMENT

10 A. The Complaint fails to state a cognizable claim for relief under the Fair Debt 11 Collection Practices Act.

12 Once again, Clark attempts to allege various causes of action under 15 U.S.C. § 1692- “Fair
 13 Debt Collection Practices Act (“FDCPA”), none of which can be properly maintained against the
 14 Defendants. These claims are barred by the doctrine of claim preclusion and are untimely.
 15 Moreover, they fail to state any claim upon which relief can be granted. As such, they should be
 16 dismissed with prejudice.

17 1. *Clark’s Complaint should be dismissed under the doctrine of claim preclusion.*

18 This Court should summarily dismiss all of Clark’s FDCPA claims, including violations
 19 of 807 1692(e), 808 1692(f), and 812 1692(j), because they are all barred by claim preclusion. A
 20 federal district court already found that such FDCA claims are untimely, and the Ninth Circuit
 21 Court of Appeals affirmed this decision.

22 The doctrine of claim preclusion bars “successive litigation of the very same claim,
 23 whether or not relitigation of the claim raises the same issues as the earlier suit.” *Taylor v. Sturgell*,
 24 553 U.S. 880, 892 (2008). Claims preclusion applies where there is “1) an identity of claims, 2) a
 25 final judgment on the merits, and 3) identity or privity between the parties” *Stewart v. U.S.*
Bancorp, 297 F.3d 953, 956 (9th Cir. 2002).

26 However, the identity of claims element of claim preclusion depends on: 1) “whether rights
 27 or interests established in the prior judgment would be destroyed or impaired by prosecution of
 28 the second action”; 2) “whether substantially the same evidence is presented in the two actions”;

3) “whether the two suits involve infringement of the same right”; and 4) “whether the two suits arise out of the same transactional nucleus of facts.” *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (emphasis added). Whether the two suits arise out of the same transactional nucleus of facts is the most important criteria. *Id*

Furthermore, 15 U.S.C. § 1692k(d) mandates that FDCPA actions be brought “within one year from the date on which the violation occurs.” Under this mandate, Judge Dorsey dismissed Clark’s claims in the 2017 action with prejudice stating that even under the most “generous calculation” Clark’s action was untimely.²⁷

Here, Clark’s attempt to refile the very claims that were already dismissed is barred by the doctrine of claim preclusion. Multiple federal courts have already dismissed these claims, and Clark is not permitted to file them in perpetuity. In this (fourth) Complaint, Clark seems to allege that his basis for recovery under the statute is that some entity engaged in a pattern of harassment by attempting to foreclose on the Property for nearly a decade.²⁸ To support this claim, he cites to several documents he alleges that were recorded starting in 2009, including the January 9, 2009, assignment.²⁹ The obvious problem with this is that the Court already considered this general argument back in 2017 and 2018 and dismissed the FDCPA claims as untimely.³⁰

Just like the 2017 action that was already dismissed, Plaintiff’s references sections 807, 808 and 812 of the FDCPA in this Complaint as well as 12 U.S.C. § 2605. Indeed, Clark is merely repeating the same claims that were already dismissed on their merits. And there is no real debate that the various lawsuits involve the same parties time and time again. Just as the court did in 2017 and 2018, so should this Court summarily dismiss the FDCPA claims.

And although Clark also hastily referenced a few documents that were filed after his original suit was dismissed, this is irrelevant and insignificant. For example, Clark referred to a Notice of Default and Election to Sell he claims was recorded on November 21, 2021.³¹ Setting

²⁷ See **Exhibit 2**.

²⁸ See *Compl 5:1-29*.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

1 aside the fact that Clark fails to state any cognizable claim for relief, the filing of this Notice
 2 occurred more than one year before Clark filed his Complaint in the instant matter, making it
 3 untimely under any calculation.

4 Clark also references the fact that Western Progressive filed a Certificate of Foreclosure
 5 Mediation on March 31, 2023, in which the mediator certified that the beneficiary is authorized to
 6 proceed to foreclosure, this is irrelevant.³² Although this recording occurred within the last year,
 7 filing a certificate after participating in Nevada's Foreclosure Mediation Program, and permitted
 8 by the Foreclosure Mediation Rules and NRS 107.080 et seq. to proceed with non-judicial
 9 foreclosure under the Deed of Trust, does not create an actionable claim for relief against
 10 Defendants, especially where no impropriety is properly alleged.

11 Consequently, Clark's claims should be dismissed on claim preclusion and statute of
 12 limitations grounds. And, even if these claims had not already been dismissed and barred by claim
 13 preclusion, they are clearly untimely as a matter of law anyway. As a result, this Court should
 14 dismiss Clark's claims in their entirety.

15 **2. The FDCPA Claims Should Be Dismissed With Prejudice Because The Claims Do**
 16 **Not Contain Specific Allegations to Which Defendants May Respond, nor state any**
 17 **claim for relief.**

18 Clark cites multiple subsections of the FDCPA in the caption of his Complaint but does
 19 not allege specifically how each Defendant purportedly violated the subsection. Clark's claims
 20 must be dismissed, then, because claims for relief must contain more than "unadorned, the
 21 defendant[s]-unlawfully-harmed-me accusation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.
 Ct. 1937, 1949 (2009).

22 Here, Clark vaguely references the 2009 assignment and seems to claim that at least one
 23 Defendant was in violation of several subsections of FDCPA.³³ But Clark fails to allege any facts
 24 in connection with the allegation or specify which Defendant committed an alleged violation.
 25 Thus, setting aside the fact that Clark's reference to the 2009 assignment as the basis for the
 26

27
 28 ³² *Id.*

³³ *Id.* at 5:10-18.

1 FDCPA claims signifies that such claims are untimely as a matter of law, Clark fails to state a
2 claim upon which relief can be granted as to each defendant.

3 Although Clark does not specify in his Complaint, which is fatal, he may be attempting to
4 allege abuse and harassment under U.S.C. § 1692d, which nonetheless fails as a matter of law.
5 U.S.C. § 1692d provides:

6
7 A debt collector may not engage in any conduct the natural consequence of which
8 is to harass, oppress, or abuse any person in connection with the collection of a
9 debt. Without limiting the general application of the foregoing, the following
conduct is a violation of this section:

10 (1) The use or threat of use of violence or other criminal means to harm the physical
11 person, reputation, or property of any person.

12 (2) The use of obscene or profane language or language the natural consequence of
13 which is to abuse the hearer or reader.

14 (3) The publication of a list of consumers who allegedly refuse to pay debts, except
15 to a consumer reporting agency or to persons meeting the requirements of section
603(f) or 604(3) [604(a)(3)] of this Act [15 USCS § 1681a(f) or 1681b(a)(3)].

16 (4) The advertisement for sale of any debt to coerce payment of the debt.

17 (5) Causing a telephone to ring or engaging any person in telephone conversation
18 repeatedly or continuously with intent to annoy, abuse, or harass any person at the
called number.

19 (6) Except as provided in section 804 [15 USCS § 1692b], the placement of
20 telephone calls without meaningful disclosure of the caller's identity.

21 Clark fails to articulate any basis to support a claim under this subsection. Indeed, Clark
22 has not alleged that Defendants used or threatened violence, used obscene language, identified him
23 as one who does not pay debts in a publication, repeatedly or continuously called him with the
24 intent to harass. In fact, Clark has not even identified this subsection as a basis of recovery in his
25 Complaint, let alone provide any factual allegations to support the claim. While he might not be
26 happy about the property being subject to a lawful nonjudicial foreclosure, this cannot, as a matter
27 of common sense and law, constitute a claim for harassment and abuse. And although Clark claims
28 that he has been harassed and abused because of “numerous foreclosure actions,” he fails to

1 mention that he has been litigating the foreclosure for years with the Court continuously ruling in
2 Defendant's favor. Clark states no claim for relief.

3 Although Clark references 15 U.S.C. § 1692e, "False and Misleading Representations," he
4 states no facts supporting a claim. Clark does not allege how each respective Defendant
5 purportedly violated this subsection. Without specific allegations beyond repeating that he takes
6 issue with the 2009 assignment, Defendants cannot answer this allegation. Therefore, this claim
7 and any allegations pertaining to it should be dismissed for failing to meet pleading standards.

8 Although Clark references 15 U.S.C. § 1692f 6(a), "Unfair Practices", he states no claim
9 for relief.³⁴ This specific allegation includes "[1] Taking or threatening to take [2] non-judicial
10 action [3] to effect dispossession...of property if [4] there is no present right to possession of the
11 property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A).
12 While Clark may assert the first three requirements were fulfilled by the posting of the Notice of
13 Default, the last element remains unfulfilled as a matter of public record: Clark's loan was secured
14 by a Deed of Trust, of which U.S. Bank Trustee is the current beneficiary and contractually
15 authorized to pursue the power of sale therein upon Clark's default in his repayment obligations.
16 This Court can take judicial notice of the Assignment to U.S. Bank Trustee, because it is a matter
17 of public record. Because the Assignment is valid and Clark lacks standing to challenge the
18 Assignment, he cannot make any assertions of fact that would fulfill the last element of this claim,
19 and, thus, this claim should be dismissed.

20 15 U.S.C. § 1692j, "Furnishing Certain Deceptive Forms" includes the following elements:
21 "[1] design, and [2] compile, *and* [3] furnish [4] any form [5] knowing [6] that such form would
22 be used to create the *false* belief [7] in a consumer [8] that a person *other than the creditor* of such
23 consumer [9] is participating [10] in the collection of or in an attempt to collect [11] a debt such
24 consumer allegedly owes such creditor, [12] when in fact such person *is not so participating*."
25 Emphasis added. Although this section is referenced in Clark's Complaint, he states no claim for
26 relief associated therewith, let alone articulate how each defendant met these elements. Absent
27 specific allegations or references to actions, Defendants are unable to answer this claim. Therefore,
28

³⁴ *Id.* at 5:16-18.

1 this claim and any allegations pertaining to it should be dismissed for failing to meet pleading
2 standards.

3 Thus, although Clark lists some specific subsections of the FDCPA, his complaint asks this
4 Court and Defendants to do guesswork as to the specific violations thereof, and to make specific
5 allegations for him. A complaint does not suffice “if it tenders naked assertions devoid of further
6 factual enhancement.” *Iqbal*, 556 U.S. at 678 (internal citations omitted). Without this further
7 factual enhancement, this Court should find that Clark’s FDCPA allegations fail to meet the
8 pleading standards of F.R.C.P. 8(a) and therefore these claims should be dismissed.

9 **B. Clark’s 12 U.S.C. § 2605 Should be Dismissed with Prejudice Because it Fails to**
10 **State a Claim upon Which Relief May be Granted.**

11 In his Complaint, Clark alleges 12 U.S.C. § 2605 as a claim for relief in the heading, but
12 does not specify, much less explain, which subsection(s) Defendant(s) allegedly violated. Nor does
13 Clark provide any factual basis to support such a claim. Therefore, Clark’s claims regarding this
14 statute and all allegations pertaining thereto should be dismissed for failure to meet pleading
15 standards.

16 To the extent that Clark seeks to allege violations under § 2605(e), his claims fail because
17 Clark failed to meet his requirements under that subsection that the borrower provide a “Qualified
18 written request” in order to compel a loan servicer to respond. Subsection (e)(1)(A) explains that
19 such requests relate to loan servicing, specifically. Moreover, as explained by the Ninth Circuit
20 Court of Appeals, this requirement

21 ensures that the statutory duty to respond does not arise with respect to all inquiries
22 or complaints from borrowers to servicers... The statute thus distinguishes between
23 letters that relate to borrowers’ disputes regarding servicing, on the one hand, and
24 those regarding the borrower’s contractual relationship with the lender, on the
other.

25 *Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 666 (9th Cir. 2012), cert. denied, 133 S. Ct. 2800,
26 186 L. Ed. 2d 861 (2013).

27 Here, Clark fails to provide any allegations relating to 12 U.S.C. § 2605. One is left to
28 wonder whether Clark simply failed to remove this reference from one of his older Complaints.

1 Suffice it to say, he has failed to state any claim upon which relief can be granted, for he failed to
 2 do any analysis of the statute at all. Accordingly, any such claim, to the extent it even exists, must
 3 be dismissed.

4 **C. Under Nevada law, there is no civil action for “harassment” which means that**
 5 **must be dismissed for failure to state a claim.**

6 Plaintiff has failed to state a claim for harassment. This is because “harassment” is not a
 7 private cause of action in Nevada.

8 Although Nevada recognizes a criminal cause of action for harassment, no such civil action
 9 exists. *Randazza v. Cox*, No. 2:12-cv-2040-JAD-PAL, 2014 U.S. Dist. LEXIS 69748 (D. Nev.
 10 May 21, 2014). Courts have routinely dismissed cause of actions for “harassment,” given that it
 11 does not exist. *See, e.g., Abrams v. Schneider*, 2017 Nev. Dist. LEXIS 867 (Eighth Judicial District
 12 Court Order July 24, 2017) (“Harassment is not a cause of action in Nevada. [The Plaintiff] cannot
 13 prevail on a non-existent action.”).

14 For example, in *Sandy v. Bank of America Corporation*, a borrower who was in default
 15 attempted to sue entities affiliated with his lender for harassment relating to the lender’s attempt
 16 to exercise nonjudicial foreclosure. No. 2:14-CV-1100 JCM (CWH), 2014 U.S. Dist. LEXIS
 17 174792 (D. Nev. Dec. 16, 2014). The borrower claimed that the “defendants physically intimidated
 18 him by hiring individuals to perform property inspections, take pictures of his home, and place
 19 envelopes at his door.” *Id.* at *14. The Court concluded that Plaintiffs failed to state a claim, noting
 20 that the borrower had failed to cite to any legal authority that established a claim for harassment.
 21 *Id.* at *14-15.

22 Here, because no private right of action for harassment exists in Nevada, Plaintiff has failed
 23 to state a claim for a relief, and this cause of action should be summarily dismissed.

24 **D. Granting Leave to Amend the Complaint would be Futile.**

25 F.R.C.P. 15(a) provides that leave to amend a complaint shall be “freely given when justice
 26 so requires.” However, leave to amend should not be granted if the proposed amendment would
 27 be futile. A proposed amendment may be deemed futile if the amendment would not withstand a
 28 motion to dismiss. *Harger v. Talley*, Case No. CV-S-05-0106-PMP (RJJ), 2005 U.S. Dist. LEXIS

1 14509 *6 (D. Nev. June 15, 2005), *citing to Wages v. IRS*, 915 F.2d 1230 at 1235 (9th Cir. 1990).
 2 Here, none of Clark's claims, if amended, would withstand another motion to dismiss for the
 3 reasons stated above; the claims are precluded because the common law and statute provide for no
 4 cause of action under the facts alleged or the limitations periods bar the claims. Thus, this Court
 5 should not grant Clark leave to amend the Complaint. Further, as demonstrated by Clark's prior
 6 attempts to challenge Defendants' authority in relation to the Note and Deed of Trust, any leave to
 7 amend would likely result in multiple attempts to revisit the same meritless claims dressed in
 8 different packaging, leading to needless multiplication of litigation.

9 **IV. CONCLUSION**

10 For the reasons stated herein, Defendants respectfully request that the Court grant their
 11 Motion to Dismiss the Complaint in its entirety, with prejudice, and without leave to amend.

12 DATED this 8th day of May, 2023.

13 WRIGHT, FINLAY & ZAK, LLP

14
 15 /s/ Christina V. Miller

16 Christina V. Miller, Esq.

17 Nevada Bar No. 12448

18 Branden D. Kartchner, Esq.

19 Nevada Bar No. 14221

20 7785 W. Sahara Ave., Suite 200

21 Las Vegas, Nevada 89117

22 *Attorneys for Defendant, U.S. Bank National*
 23 *Association, as Trustee for MASTR Asset*
 24 *Backed Securities Trust 2006-HE5 Mortgage*
 25 *Pass-Through Certificates, Series 2006-*
 26 *HE5(erroneously name US Bank National*
 27 *Association), Western Progressive-Nevada,*
 28 *Inc., and PHH Mortgage Corporation*
(erroneously named as "PHH Mortgage
Services")

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 8, 2023, and pursuant to Fed. R. Civ. P. 5(b), I served via the CM/ECF electronic filing system a true and correct copy of the foregoing **MOTION TO DISMISS** to all parties registered to receive CM/ECF notification.

/s/ Tonya Sessions

An employee of Wright Finlay & Zak LLP

EXHIBIT LOG

| | |
|-----------|-----------------------------------------------------|
| Exhibit 1 | March 16, 2018 Dismissal Order |
| Exhibit 2 | September 10, 2019 Dismissal Order |
| Exhibit 3 | January 26, 2021 Ninth Circuit Order of Affirmation |